United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

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United States Court of Appeals

FOR THE SECOND CIRCUIT

LOCAL 1104, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, and LOCAL 1101, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,
Petitioners,

—against—

NATIONAL LABOR RELATIONS BOARD,
Respondent,

NEW YORK TELEPHONE COMPANY,
Intervenor.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

BRIEF ON BEHALF OF INTERVENOR NEW YORK TELEPHONE COMPANY

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BRIEF ON BEHALF OF INTERVENOR NEW YORK TELEPHONE COMPANY

Statement

This brief is submitted on behalf of the Intervenor, New York Telephone Company (hereafter "Company") in support of its position that the actions of the Petitioners were flagrant violations of sections 8(b)(1)(A) and 8(b)

(2) of the Labor-Management Relations Act, as amended (hereafter "Act") and in opposition to the petition for review filed by the Petitioners.

This proceeding requires the Court to examine the underlying intent and purpose of the Act to resolve a basic conflict between employees' Sec. 7 rights and a union's attempt to quash those rights under the guise of union security. The essential issue in this case is whether a union violated a fundamental purpose of the Act when it demanded dues payments from employees and then demanded their discharge for failure to pay dues while denying them membership.

The two cases before the National Labor Relations Board (hereafter "Board") were consolidated for trial before the Administrative Law Judge (hereafter "ALJ"). One decision was rendered. In Case No. 29-CB-1347-3 (hereafter "Rigby Case") the Board held that Local 1104 violated sections 8(b)(1)(A) and 8(b)(2) by seeking the discharge of an employee, Rigby, under the Agency Shop provisions of the collective bargaining agreement for failing to pay dues while denying him membership in Local 1104. Rigby was denied membership simply because of his organizational activities on behalf of a rival union, conducted while he was not a member of Local 1104 and prior to his application for membership (54a).* Except for these activities, Rigby was otherwise qualified for membership. During the '71-'72 strike of employees of the Company represented by the New York Company locals of the Communications Workers of America, AFL-CIO, he observed the picket lines and refrained from working.

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*This fact was stipulated to by Local 1104 and the General Counsel. Numbers in parentheses refer to pages in the Joint Appendix.

Petitioner Local 1104's unlawful, coercive conduct, which was the subject of the complaint before the Board, was the demand for Rigby's discharge made at a time well within the Act's section 10(b) limitation period. The legality of that strike is not material to the Rigby case. The validity of the Union's denial of membership to Rigby is also not directly in issue.

In Case No. 29-CB-1426 (Telco case),* the Board held that Petitioner Local 1101 violated sections 8(b)(1)(A) and 8(b)(2) of the Act by seeking the dismissal of other employees of the Company for failing to pay dues, under the same Agency Shop provision of the Agreement, while denying to them membership. In this case, membership was denied because these employees exercised their rights guaranteed by the Act and crossed picket lines established by Local 1101 during the July '71 to February '72 strike while they were not members of Petitioner Local 1101. In both the Rigby case and the Telco case, the employees involved applied for membership after the strike and remained willing to pay dues and initiation fees as members.

The active conduct amounting to coercion in the Telco case was the demand made by the Union to the Company to discharge these employees which was well within the Act's section 10(b) limitation period.

The Facts

The material facts are undisputed. The Communications Workers of America, AFL-CIO, (hereafter "CWA")

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* To avoid confusion, the Intervenor will use Petitioners' designations of Rigby and Telco cases to distinguish between the two cases.

is the collective bargaining representative for employees in a number of separate bargaining units in the Bell System. Since 1961, it has represented the Company's plant department and certain other employees.

Petitioners are constituent locals of the CWA, (hereafter collectively referred to as "Union") operating within designated jurisdictions of the New York Telephone Company bargaining unit. Local 1101 represents employees in Manhattan and Bronx, and Local 1104 those in Nassau County.

The Board has held in *Communications Workers of America, AFL-CIO (New York Tel. Co.)* 208 NLRB No. 32, 85 LRRM 1104 (1974) that the CWA strike of '71-'72 was in violation of sections 8(b)(3) and 8(d) of the Act.* The Union conceded this (Petitioner's brief, P. 5), and did not except to the findings of the ALJ in that regard in the case at bar.

During the course of the CWA strike, some employees, including those mentioned in the Telco case here, crossed picket lines and reported to work. Employees in the Telco case were not members of the Union (74a).

The Collective Bargaining Agreements prior to the one agreed to in February 1972, which settled the strike, had neither a Union Shop nor an Agency Shop provision. They contained only maintenance of membership dues clauses (74a). Membership had always been voluntary. In February 1972, for the first time in the collective bargaining relationship between the Company and the Union, an Agency Shop provision was negotiated into the Agreement. That clause provides in material part as follows:

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* The official transcript, exhibits and stipulations in that case (208 NLRB No. 32) were stipulated into evidence in the proceedings before the ALJ in the case at bar (72a).

> "33.01 Each regular employee shall, as a condition of employment, pay or tender to the Union amounts equal to the periodic dues applicable to members for the period beginning 30 days after hire or 30 days after February 17, 1972, whichever occurs later, until the termination of this collective bargaining agreement, except that an employee may terminate this condition of employment by giving a written individual notice to the Company and the Union of such termination by certified or registered mail, return receipt requested, and postmarked between July 8, 1974 and July 17, 1974 both dates inclusive." (75a)

Sometime during the month of July 1972, the employees in the Telco case applied for membership in the Union. Their membership applications were rejected by Petitioner Local 1101 because the employees had crossed picket lines established by the CWA during its unlawful strike against the Company.

Contrary to the Petitioners' contention (P. 5 of brief), there is no evidence in the record of these employees' motives in crossing picket lines. However, in view of the entire record, it is perhaps more valid to assume that, in order to avoid losing the Act's protection, they crossed the picket lines in an unlawful strike than to assume, as Petitioners have done, that they merely disapproved of the strike.

Moreover, to refer to these employees as strikebreakers is inappropriate for several reasons. Aside from interjecting emotionalism into these proceedings that obfuscate the issues, there is nothing in the record to indicate that these employees violated any strikebreaking statutes—either federal or state. Indeed, in *Communications Workers of America, AFL-CIO, (New York Tel. Co.)* 208 NLRB

No. 32, 85 LRRM 1104 (1974) the Board expressly held that it was the Union that committed unlawful acts in attempting to fine employees for crossing picket lines in the '71-'72 unlawful CWA strike.

Though the employees in the Telco case had been willing to pay dues and initiation fees as members, they subsequently refused because they were denied membership by the Union. On December 4, 1972, the Union asked the Company to discharge them under the Agency Shop provision of the Agreement.

Membership in the Union was denied to Rigby because he had attempted to organize on behalf of the Teamsters while he was not a member of the CWA. At no time during the strike did he cross CWA picket lines. At all times he was otherwise eligible for membership in the CWA and its constituent locals under their Constitution and By-Laws.

There is no basis in the record for the Union's misleading claim that Agency Shop fees are owed solely to provide "services, activities and benefits in which non-members of the Unions participate equally with members.". (p. 5 of Petitioners' brief) In any event, it would be appropriate to take judicial notice of the fact that union dues pay for services or expenditures that do not necessarily benefit non-members. Examples of these are the payment of strike benefits, union financed medical or dental benefit plans, union sponsored picnics and outings, as well as political contributions. Moreover, Union members are accorded certain rights not accorded non-members. While a dues paying member may vote on contract ratification and for Union officers, a dues paying non-member is not permitted to do either under the Union's Constitution and By-Laws.

Statute Involved

Labor-Management Relations Act— Relevant Sections

Sec. 1(b): "Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety or interest.

"It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce." (29 U.S.C. sec. 141(b))

Sec. 7: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requir-

ing membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title." (29 U.S.C. sec. 157)

Sec. 8(a): "It shall be an unfair labor practice for an employer—

* * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * *

". . . *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization . . .

* * *

"(B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . ." (29 U.S.C. §158(a)(3))

Sec. 8(b): "It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . ." (29 U.S.C. sec. 158(b)(1)(A))

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate

against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . ." (29 U.S.C. sec. 158(b)(2))

Sec. 8(d): ". . . *Provided*, That where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and con-

> ditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: . . ." (29 U.S.C. sec. 158(d))

Sec. 10(b): ". . . *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, . . ." (29 U.S.C. sec. 160(b))

The Issues

It is respectfully submitted that a decision on the timeliness of a complaint based on the fact that the strike violated section 8(d) of the Act need not be reached by the Court in deciding the Telco case. It is the Company's position that, in any event, the Union may not enforce an Agency Shop clause of the Agreement against employees whom the Union denied membership because they exercised fundamental rights guaranteed by the Act.

It is respectfully submitted, therefore, that the only issue necessary for the determination of both the Rigby case and the Telco case is, assuming *arguendo* only that the strike was legal, was the Board correct in holding that the Union may not, under the guise of an Agency Shop clause, compel the discharge of employees who refuse to pay dues because the Union denied them membership for exercising fundamental rights under the Act?

Additional issues have been raised by Petitioners because of the Board's decision in the Telco case and are therefore before this Court:

> 1) Was the Board correct in holding that the denial of membership to employees for crossing picket

lines maintained in a concededly unlawful strike, was a violation of section 8(b)(1)(A) of the Act?

2) Did section 10(b) bar the issuance of the complaint where the acts of coercion, to wit, the unlawful denial of membership or the demand for discharge occurred within six months of the filing of the charge?

Summary of Argument

It is respectfully submitted that the Union's right to self-defense or self-preservation is not in issue in the case at bar. What is at stake is the employees' ability to exercise fundamental rights guaranteed by Congress free of the coercion embodied in the threat of loss of employment. For the Court to enforce the Board's decision in favor of protecting these rights under the circumstances of these cases clearly would not impair either the Union's existence or hamper its so-called right to self-defense.

Significantly, for over eleven years the CWA maintained a viable and increasingly strengthened collective bargaining relationship with the Company and increased its membership without either a Union Shop or an Agency Shop. Membership was purely voluntary. Even the minimal hard core financial membership belabored by the Union in its brief was not required. "Free rides" historically were permitted. There are, therefore, no factual bases for the bare claim that the Board's holding threatens the Union's existence because it will not be able to collect fees from those few employees in this case who have been denied membership.

In determining the substantial issues raised here, the Court must also be mindful of what the Union has at-

tempted to accomplish. In both cases before the Court, the dictates of the Union were not followed by a minority of employees in the New York Company bargaining unit. However, the Union was not content to merely deny membership to those employees as a means of enforcing Union solidarity and discipline. Instead, it attempted to enlist the aid of an employer—the Company—to enforce internal Union rules of discipline against non-members by the threat of loss of employment—clearly, a violation of a fundamental purpose of the Act.

Moreover, the Union is seeking to impose upon the employees an unwelcome Hobson's choice. There is no dispute that the CWA strike of '71-'72 was unlawful. Had the employees observed the unlawful picket lines they would have lost the protection of the Act. In other words, they could have been discharged by the Company with impunity. If the Union's position is upheld, the employees would be confronted with the choice of either losing the protection of the Act or crossing unlawful picket lines and lose their rights to membership in the Union and possibly their jobs.

POINT I

The Board correctly held that to coerce employees by seeking their discharge for failing to pay dues, while denying to them membership because they exercised fundamental rights guaranteed by the Act, is a flagrant violation of the Act.

It is beyond cavil that the Board is the agency charged with the primary function of enforcing national labor policy. Because of its unique responsibilities exercised over the years, it has acquired an expertise which the Courts are bound to accord a degree of deference. As

Justice Frankfurter appropriately observed in defining the Court's role in reviewing "the whole record" before the Board in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951):

> ". . . Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a Court may displace the Board's choice between two fairly conflicting views, even though the Court would justifiably have made a different choice had the matter been before it *de novo*." (at 488)

A similar view was expressed earlier in *NLRB* v. *Virginia Electric & Power Co.*, 314 U.S. 469 (1941) when Mr. Justice Murphy stated:

> ". . . we must ever guard against allowing our views to be substituted for those of the agency which Congress has created to administer the Act." (at 476)

The deference to be accorded the Board by the judiciary was also recognized by the 7th Circuit when it affirmed the Board's decision in *Union Starch & Refining Co.* v. *NLRB*, 87 NLRB 779 (1949), 186 F.2d 1008 *enf'd* (7th Cir.), *cert. denied* 342 U.S. 815 (1951). The Court stated:

> "We have been told that the remedial powers given the Board by this section were fashioned for the 'Attainment of a great national policy through expert administration in collaboration with limited judicial review [and] must not be confined with-

> in narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies.' *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 188, 61 S.Ct. 845, 850, 85 L.Ed. 1271. Accordingly, it is uniformly recognized that the variable pattern of discriminatory practices revealed in cases before the Board requires a correspondingly variable set of remedial orders, if the Board is to fulfill its duty of taking appropriate steps to dissipate the effects of unfair labor practices . . ." (at 186 F.2d 1014)

The foregoing concepts of limited judicial responsibility in reviewing Board decisions is especially applicable in this case where the Union is asking this Court to overrule the principles established by the Board in *United Steel Workers of America, Local 4186 (McGraw Edison Company)*, 181 NLRB 992 (1970) which have been in effect for several years, and were not challenged in Court by the Steelworkers, the party affected most by the decision in that case.*

The compelling rule settled by *McGraw Edison* is that it is unlawful coercion for a union to enforce an otherwise valid Union security clause while denying membership to employees where such enforcement serves to discourage an employee from exercising a fundamental right guaranteed by the Act. The Board held that a union violated the Act when it sought to compel the discharge of an employee under a valid union security contract when his membership rights were significantly impaired.

In that case, the employee had previously filed a decertification petition with the Board. After the Union was

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* It should be noted that the *Steel Workers*, a major union, has been in the forefront of labor unions' efforts for the preservation of their prerogatives.

restored as collective bargaining representative by a majority vote, the employee was forbidden by the Union for one year to attend meetings, and for an indefinite period, to hold office. He was permitted to retain his shell of a membership in the Union. The employee refused to pay dues and the Union threatened to obtain his discharge.

The Board made it clear that it was not dealing with the Union's right to discipline a member by fining or expulsion, and observed that the impairment of membership rights by itself was not necessarily unlawful. It was the insistence of payment of dues upon penalty of discharge while membership was impaired that constituted the unlawful conduct. The Board stated:

> "However, Respondent's insistence upon Blaine's continued payment of dues during periods when his rights as a member were significantly reduced *constituted a continuing form of coercion* tending to operate as a serious restraint upon access to Board processes." (Emphasis added, at 992).

The Board stated further:

> "We see no justification, either in the proviso to section 8(b)(1)(A) *or in considerations of a labor organization's need for self preservation, for the steps taken against Blaine. The threat to enforce the union security clause while continuing the sanctions against Blaine was hardly necessary to preserve the Union's existence* as an institution, *nor could it be viewed as a noncoercive form of internal discipline which would have no discouraging effect upon a member's decision to invoke the Board's representation procedures.*" (Emphasis added, at 992).

The significance of this decision is threefold. First, the Board specifically recognized that filing a decertification

petition was the exercise of a fundamental right granted by Congress which had to be protected. Second, the threat to seek the employee's discharge under a valid Union security clause for failing to pay dues, while his membership rights were reduced (not destroyed as in the case at bar) was a continuing act of coercion upon the exercise of that right of access to the Board. Third, and contrary to Petitioners' contentions in their brief, even where the most direct attack on a union's existence is made, (a decertification petition) the Union's right to self-defense does not take precedence over an employee's exercise of a fundamental right under the Act.

Contrary to Petitioners' implication (p. 18 of their brief), the central premise of national labor law is not the protection of strong labor unions for the purpose of collective bargaining. The very thrust and development of national labor policy as expressed in the Act as well as in Board and judicial precedent is in the direction of increased protection of fundamental rights of individual employees as against the encroachment of employers and unions. Thus the *Wagner Act*, directed solely at employer actions, was amended by *Taft-Hartley* in 1947 to be equally prohibitive of union behavior. *Landrum-Griffin* was passed to further insure the protection of individual employee rights by fostering internal union democracy.

In *NLRB* v. *Schwartz*, 146 F.2d 773 (1945) the 5th Circuit observed:

> "Contrary to a rather general misconception, the National Labor Relations Act was passed for the primary benefit of the employees as distinguished from the primary benefit to labor unions, and the prohibition of unfair labor practices designed by an employer to prevent the free exercise by employees of their wishes in reference to becoming members of a union was intended by Congress as

> a grant of rights to the *employees* rather than as a grant of power to the union." (Emphasis in original, at 774)

In the Act itself Congress declared in section 1 its purpose and policy to be in part ". . . to protect the rights of individual employees in their relations with labor organizations. . . ." (29 U.S.C. Sec. 141(b))

The very first words in Sec. 7 of the Act are "Employees shall have the right to . . ." not "Unions shall have the right to". Moreover, Sec. 7 expressly states that employees shall have the right in addition to organizing and bargaining coleletively "to refrain from any or all of such activities" (29 U.S.C. sec. 157).

While the clear purpose of section 7 is that the rights of individual employees must be protected against excesses by either employers or unions, the Act does recognize that a proper balance must be struck in the limited area where these rights conflict with a Union Shop. In *NLRB* v. *Allis-Chalmers Mfg. Co.* 388 U.S. 175 (1967) cited by the Union, which upheld a union's right to fine members, the Supreme Court nevertheless expressly stated that Sec. 8b(1)(A) barred ". . . enforcement of a union's internal regulations to affect a member's employment status." (at 195). The Board saw fit, in *McGraw Edison,* to strike a balance in favor of protecting the rights of employees even when the exercise of that right represented a direct frontal attack on the Union's existence. (a decertification petition) In view of the emphasis of the Act on the protection of employee rights, it is submitted that the resolution by the Board of any doubts in favor of the individual employee's rights was correct.

The rights of the individual were again upheld by the Board in *Communication Workers of America,* 9509 (*Pacific Tel. & Tel.*) 193 NLRB 83 (1971). There, an em-

ployee, while a member of the CWA, had distributed membership cards and literature in the name of a rival labor organization. While the Board referred to this as decertification activities, the employee did not actually file a decertification petition. Nevertheless, he was expelled from the CWA for these actions. After he refused to continue to pay dues, the CWA demanded his discharge under a contract clause conditioning employment on the payment of dues. The Board, citing *McGraw Edison, supra*, held this to be a violation of sections 8(b)(1)(A) and (2) of the Act.

The employee's activity in that case was in no way different than that engaged in by Rigby except that Rigby was not a member of the CWA when he attempted to organize on behalf of the Teamsters. Indeed, the Union's right here to discipline him is even more tenuous because he was not a member. His Sec. 7 rights could not be restricted lawfully by Union membership rules applicable only to members. In any event, both Rigby and the employee in *Pacific Tel. & Tel.* were exercising a fundamental right guaranteed by section 7 of the Act—to plump for rival unions.

It is submitted that if a primary function of the Board is to protect rights guaranteed by Sec. 7 of the Act, then unless an employee has unimpeded access to the Board those rights are meaningless. It would seem to be equally appropriate to protect the employee's exercise of fundamental rights even before he attempts to gain access to the Board. This was recognized implicitly in *Pacific Tel. & Tel., supra*, when it protected the employee's right to distribute literature and cards on behalf of a rival union as a preliminary step to filing a decertification petition. Unless the right to be protected by the Board is established, *ab initio*, then the employee's unimpeded access to the Board would be ineffectual.

The refusal of employees who are not members of a union to refrain from supporting a strike called by that union, even if the strike were lawful, is similarly a fundamental right guaranteed by Sec. 7 of the Act. Attempts by unions to fine employees because they exercised that right have been held to be unlawful. *NLRB* v. *Granite State Joint Board*, 409 U.S. 213 (1972); *Communications Workers of America, AFL-CIO, (New York Tel. Co.)* 208 NLRB No. 32, 85 LRRM 1104 (1974).

It follows, therefore, that it is equally invalid as an act of continuing coercion to attempt to cause an employee's discharge under a union security clause, while denying to him membership for exercising the same right. The discouraging effect on the exercise of this section 7 right is obvious. Clearly, the employee, knowing that he will be compelled to pay dues without having accorded to him membership rights, will refrain from crossing picket lines.

This reasoning is equally applicable to the Rigby case. Unless Rigby, who was not a member of CWA, is accorded the unfettered right to organize on behalf of a union of his choice, his unimpeded right to file a decertification petition would be rendered illusory.

It must be emphasized that the curtailment of the right of the Union to discipline members for violating a valid CWA rule (assuming *arguendo* only that the strike was lawful) was not the main objective of the complaint in this case. It is recognized that when employees join a union, their section 7 rights are to a limited extent diluted. For example, a union may fine or expel members for dual unionism or for crossing picket lines lawfully established for a lawful objective.

What is being questioned by the complaint is the Union's right to engage in coercive acts by jeopardizing the liveli-

hoods and rights to jobs of employees who were not members simply because the union seeks to maintain solidarity and discipline. This is clearly in violation of Congress' policy established to protect employees against the evils of compulsory unionism and the enforcement of union discipline through the means of placing employees' jobs in jeopardy. Thus, the Closed Shop was declared unlawful and the Union Shop was permitted only to the extent of allowing the employee the choice of remaining or not remaining an active member—he may not be fired so long as he tenders his dues. And the Agency Shop was declared to be a permissible, more flexible form of union security by the Supreme Court in a case where *the employee was given the option* to either join the union or not join and pay amounts equivalent to dues.

In *Union Starch & Refining Co.*, 87 NLRB 779 (1949), *enf'd*, 186 F.2d 1008 (7th Cir.), *cert. denied*, 342 U.S. 815 (1951) the Board, early in the history of the Act, declared unlawful a union attempt to foster compulsory unionism by way of a Union Shop clause. The Board upheld the right of an employee *to refrain at his option* from becoming a full participating member, even under a Union Shop, so long as he tenders his dues. The Board stated:

> "If the union imposes any other qualifications and conditions for membership with which he is unwilling to comply, such an employee may not be entitled to membership, but he is entitled to keep his job. Throughout the amendment of the Act, Congress evinced a strong concern for protecting the *individual employee in a right to refrain from union activity* and to keep his job even in a union shop. Congress carefully limited the sphere of permissible union security, and even in that limited sphere ac-

> corded the union no power to effect the discharge of non-members except to protect itself against 'free rides'." (Emphasis added, at 87 NLRB 784)

The Board noted the policy of Congress to protect the employees' job security when questions of membership arise and quoted with approval the following portion of *House Report* No. 510, on H.R. 3020, p. 41:

> "The committee did not desire to limit the labor organization with respect to either its selection of membership or expulsion therefrom. But the committee did wish to protect the employee in his job if unreasonably expelled or denied membership. The tests provided by the amendment are based on facts readily ascertainable and do not require the employer to inquire into the internal affairs of the Union." (at 87 NLRB 784, n. 13)

The Board's decision and reasoning were upheld by the 7th Circuit. While deferring to the expertise of the Board, the Court stated further:

> ". . . We think the Board construed the statute in a reasonable manner and gave effect to all its provisions, and that its interpretation was in harmony with the purpose of Congress to prevent utilization of union security agreements except to compel payment of dues and initiation fees . . ." (186 F.2d at 1012)

Clearly, Congress' intent in passing the proviso to section 8(a)(3) which declared the Union Shop to be lawful was to eliminate compulsory unionism. This is supported by the following remarks of Senator Taft during the debate on the provision:

> "I merely wish to say that of course many persons believe that the union shop, which is the usual form of closed shop, should be absolutely prohibited. The committee did not feel that it should go that far, but the committee felt that if it permitted a union shop agreement which provided that every man must be a member of the union, then the union must

> be reasonable, must accept as members all who apply for membership, and must accept them on the same terms as it applies to other members, and must permit them to remain in the union if they are willing to pay their dues. In other words, the position of the committee was this: Either we must have an open shop or we must have an open union. We cannot have both." *II Legislative History of the Labor Management Relations Act, 1947*, 1096 (GPO 1948).

If we accept, as we must, the Board's decision in *McGraw Edison*, *supra*, that the enforcement of a union security clause can be an act of coercion, then clearly its use by Petitioners in this case was an act of coercion for the purpose of discouraging support for rival unions or discouraging non-members from crossing picket lines maintained by Petitioners. The enforcement of the Agency Shop clause in this case would amount to fostering compulsory unionism and union discipline in violation of the intent and spirit of the *Union Starch* holding. See also *Los Angeles Paper Handlers Union (J.W. Clement)*, 188 NLRB 420 (1971). (Holding that a union violated sections 8(b)(1)(A) and (2) by seeking the discharge of an employee for his refusal to pay dues while he was not accorded *full* membership rights in the Union.)

The Company's position in this case finds support in the Supreme Court's rationale in *NLRB* v. *General Motors*, 373 U.S. 734 (1963). There, the Court established for the first time the legality of the Agency Shop where the agreement expressly gave the employees the option of joining the union and paying dues as members, or of merely paying the equivalent of union dues without becoming members.

Significantly, the Court expressly noted that the grant to employees of this option actually served the Congressional purpose of eliminating the evils of compulsory unionism. The Court stated:

> *"The agency shop arrangement proposed here removes that choice from the union and places the*

option of membership in the employee while still requiring the same monetary support as does the union shop. Such a difference between the union and agency shop may be of great importance in some contexts, but for present purposes, it is more formal than real. *To the extent that it has any significance at all it serves, rather than violates, the desire of Congress to reduce the evils of compulsory unionism while allowing financial support for the bargaining agent.*" (Emphasis added, at 744).

If the Union were to prevail here, the option spoken of with favor in *General Motors, supra*, would not be available to the employees. Petitioners' claim notwithstanding, (p. 17 of brief) the Union would be open to everyone except those employees who exercised fundamental rights guaranteed by the Act. The evil of compulsory unionism would be given free license because the Union would be able to coerce employees either to become members or to subject themselves to Union discipline while not members, by the threat of enforcing the Agency Shop provisions of the Agreement.

Moreover, we would be confronted with an anomolous situation. Under *Union Starch, supra*, the employee has the option of joining or tendering dues where a Union Shop exists. Under an Agency Shop, a more liberal form of union security, this *option* would not be available to the employee. This could not have been intended by either the Board in *Union Starch* or the Supreme Court in *General Motors*.

Moreover, it was noted favorably by the Board in *Union Starch*, that its decision there would actually encourage employees to seek membership to participate in union affairs and thereby foster union democracy. The Board stated:

> "As a general rule, rather than refraining, employees are likely to insist upon participating in the affairs of a union to whose treasury they are required to contribute. Indeed without such an attitude on the part of the employees involved, a union is hardly likely to obtain the vote necessary to authorize the execution of the union-security agreement." (at 87 NLRB 786)

On the other hand, a reversal of the Board and the adoption of the Petitioners' viewpoint would actually serve to discourage active participation in union affairs. Unions could expel members or deny membership to employees, preventing them from exercising their right to vote on proposed contracts or to elect the union leadership of their choice while forcing the employees to pay the Agency Shop fee to the union treasury. Not only would an undesirable system of taxation without representation be installed, but the likelihood is increased that power cliques would perpetuate themselves in power without having to answer to an active membership.

Petitioners' argument that the Union's right to prevent free rides was placed in jeopardy by the Board's decision must also be rejected. The employees here are all willing to pay their dues provided they are given the right to become full members. Moreover, their acceptance as members could in no way harm the Union. In the Telco case, the employees merely crossed picket lines maintained in an illegal strike. There was nothing in their conduct to indicate a malevolent attitude to unions per se. Even Rigby, who preferred another union, nevertheless subjected himself to union discipline and refrained from crossing the picket lines. Indeed, accepting these employees as members would more likely increase the Union's power over them. Under the law, a union has more power to discipline members than non-members. Fines can be

levied and collected, suspensions meted out and other legitimate penalties imposed that could not be imposed on non-members.

In addition, the express language of section 8(b)(2) supports the Company's position. That section prohibits discrimination where ". . . membership in such organization has been denied or terminated on some ground *other* than his failure to tender the periodic dues . . ." (Emphasis added.) [29 U.S.C. sec. 158(b)(2)]. See also Sec. 8(a)(3) [29 U.S.C. Sec. 158(a)(3)] The employees here were denied membership in the Union for reasons other than their failure to tender dues. Their refusal to pay dues was directly related to the denial to them of membership because they crossed picket lines or supported another union. It is for these reasons that the Company was asked to discriminate against them.

Moreover, even the case of *NLRB* v. *District Lodge No. 99*, 489 F.2d 769 (1st Cir. 1974) cited by Petitioners in support of the proposition that a union may discipline its members (pp. 9 and 23 of their brief) supports the Company's position in the case at bar. The facts there reveal that the employees (expelled members of the union) crossed picket lines maintained in a *lawful* strike. The Union constitution provided for the expulsion of members for a period of years for crossing picket lines in a lawful strike. The Court actually held that membership may be barred to those employees who crossed picket lines in a *lawful* strike. That case did not deal with a strike in violation of section 8(d) as in this case. Nevertheless, in its opinion, the First Circuit Court stated that though a union may deny membership to those employees who crossed picket lines in a lawful strike, it may not seek the aid of the employer to enforce that rule. The Court stated:

> "Yet rarely have courts interfered in the internal membership policies of unions. At most, courts have simply refrained from enforcing union rules, *or have prohibited employers from enforcing those rules*, still allowing the union to enforce its rules under threat of expulsion from membership . . ." (Emphasis added, at 771).

The Court expressly noted that while a union may discipline members or act in self-defense, Sec. 7 of the Act still

> ". . . may protect an employee from union control enforced by the courts or employers . . ." (at 771)

POINT II

The Board was correct in holding that employees cannot lawfully be denied membership for returning to work from a strike that was in violation of section 8(d) of the Act.

It is settled that a union violates section 8(b)(1)(A) by attempting to enforce union rules of behavior against employees which are in violation of public policy or the Act. *Scofield* v. *NLRB*, 394 U.S. 423, (1969); *NLRB* v. *Marine Workers*, 391 U.S. 418 (1968). In *Scofield*,* the Supreme Court stated:

> ". . . It has become clear that if the rule invades or frustrates an overriding policy of the labor laws,

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* While the Supreme Court upheld a union's fining and suspending members for violating a rule on production ceilings, the Court noted with favor that the members' job security was not endangered by such actions of internal union discipline. (at 428 and 435).

> the rule may not be enforced, even by fine or expulsion without violating §8(b)(1)." (at 429)

The Court stated further:

> ". . . §8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has embedded in the labor laws. . . ." (at 430)

In *CWA, Local 1170 (Rochester Tel. Corp.)*, 194 NLRB 872 (1972), this principle was applied to prohibit fines against members as well as non-members of a union who refused to comply with a union order not to accept temporary supervisory positions. The fine against the non-member obviously was unlawful. But significantly, the Board concluded that the union's directive violated section 8(b)(3) and 8(d) and that the charges against the members were also in violation of Sec. 8(b)(1)(A). The Board stated:

> "As to . . . a union member, we find that the Union's action also constituted restraint and coercion not sanctioned by the proviso to Section 8(b)(1)(A) because the charges against her did not stem from violations of a lawful union rule dealing with purely internal matters, but to the contrary, *sought to enforce conduct found violative of Section 8(d)* and 8(b)(3) of the Act." (Emphasis supplied, at 873)

In *International Union District 50 (International Grinding Wheel Co.,)* 176 NLRB 628 (1969) a case relied on in *Rochester Telephone*, a union ordered its members to honor a sister local's picket line in violation of a no-strike clause of the collective bargaining agreement. The union sought to compel obedience to its directive by fines which the Board concluded were in violation of Section 8(b)(1)(A). The Board stated:

> ". . . To hold that a union, despite the prohibition in Section 8(b)(1)(A) against restraining or coercing of employees in their rights under Section 7, could nevertheless with impunity penalize members for failing or refusing to participate in a violation of a no-strike clause is to provide an incentive to unions and members to violate contracts. This too runs counter to a basic policy of the statute." (at 632)

Thus, it is obvious that in the Telco case the Union was seeking to punish employees by denying them membership for abandoning an unlawful strike in violation of Section 8(d).

Clearly, if the strike in the Telco case violated Section 8(d), then the Union may not enforce a rule denying employees membership rights because they did not adhere to the Union's unlawful policy. It doesn't matter to the employee whether he was expelled or denied membership—his membership rights are equally impaired. Nor does it matter to the employee that he did not know the strike was unlawful. The effect on the employee is the same. He would have lost the protection of the Act solely because the Union sought to enforce a directive [a strike in violation of Section 8(d)] that Congress has stated is against public policy.

POINT III

The Board was correct in holding that the complaint charging violations of Sections 8(b)(1)(A) and (2) was timely under section 10(b).

The charges upon which the complaint was based were filed within six months of the date the employees were denied membership or the Union's request for the employees' discharge was made. The fact that the strike itself began more than six months earlier does not preclude the filing of the charge because the Union's active coercive conduct occurred when the employees were denied membership or the demand for their discharge was made.

In its pertinent part, the proviso to section 10(b) states:

> ". . . no complaint shall be issued based upon any unfair labor practice occurring more than six months prior to the filing of a charge . . ."

To hold that section 10(b) barred that portion of the complaint charging a violation of 8(b)(1)(A) and (2) because of the illegality of the strike, would result in preventing the employees from obtaining relief against unlawful conduct at the very moment the conduct occurs, an anomaly unwarranted by the literal language of section 10(b).

The Supreme Court decision in *Local Lodge No. 1424, IAM* v. *NLRB* (*Bryan Mfg. Co.*,) 362 U.S. 411 (1960), expressly permits reliance on pre-10(b) conduct to elucidate the true quality of events occurring in the 10(b) period. In that case, the specific question presented was whether the continued enforcement of a collective bargaining agreement with a union security clause was unlawful because the union did not represent a majority of

the employees in the unit when the agreement was executed. It was held that an unfair labor practice complaint was barred because the charge had not been filed *within six months of the execution of the agreement.* Subsequent acts to enforce the agreement did not create a continuing violation, the Court said, because:

> ". . . the vice in the enforcement of this agreement is manifestly not independent of the legality of its execution, as would be the case, for example, with an agreement invalid on its face or with one validly executed, but unlawfully administered." (at 423)

Enforcement of the agreement, though continuing, was a continuing violation "solely by reason of circumstances only at the date of execution" said the Court.

The Court's opinion, to be properly understood, must be considered in the context of several aspects of that decision. First, the putative "continuing violation" which the Board found in that case was indivisible from and identical to the violation arising out of the execution of the agreement. Second, there was no other *active conduct constituting a violation within the six-month period,* other than continued enforcement of the agreement.

The Court drew a distinction between two types of situations:

> "The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose §10(b) *ordinarily does not bar such* evidentiary use of anterior events. The second situation is that where conduct occurring within the lim-

> itations period can be charged to be an unfair labor practice only through reliance on an earlier unfair practice. There the use of the earlier unfair labor practice is not merely 'evidentiary', since it does not simply bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful." (at 416; footnote omitted).

The first part of this statement has been the basis for numerous rulings—including *Communications Workers of America, AFL-CIO (New York Tel. Co.)*, 208 NLRB No. 32, 85 LRRM 1104 (1974) to the effect that evidence predating the 10(b) period may be relied on to illuminate the unlawful character of the active conduct that occurred within the 10(b) period. In *Plumbers & Pipe Fitters Local 214*, 131 NLRB 942, enf'd 298 F.2d 427 (5th Cir. 1962), a complaint for causing an employee's discharge for discriminatory reasons was allowed—although the only evidence bearing on the discriminatory basis for the discharge consisted of events prior to the 10(b) period which explained why the employee was discharged.

When it enforced the decision, the Fifth Circuit, noting that 10(b) was an ordinary statute of limitations, commented that:

> ". . . It does not seem reasonable to argue that the statutory limitation period begins to run before the violation occurs." (at 298 F.2d 428)

The Court said further:

> "Hall (the employee) hardly could have been expected to file charges before he was discharged . . . it seems logical that the six-months' limitation period would begin with the discharge rather than the demand therefor." (at 298 F.2d 428)

It must be emphasized that the Telco case does not involve a "continuing violation". The rejection of the employees' membership applications and the request by the Union to discharge the employees are entirely *separate* and distinct from the strike's violation of sections 8(b)(3) and 8(d). No relief has been requested in this complaint *vis-a-vis* the unlawful strike. The gravamen of the complaint in the Telco case is the unlawful coercion which occurred when the applications for membership were rejected or the requests for discharge were made. Their unlawfulness depends, in part, on whether the actions were in furtherance of a legitimate union concern or a course of conduct that violated public policy.

If 10(b) bars that portion of the complaint, then section 8(b)(1)(A) would be emasculated and unions with impunity could compel employees to adhere to unlawful policies simply by waiting six months before punishing recalcitrant members or denying membership to new applicants. For example, an awareness by employees that punishment may be levied in the future could effectively force obedience to union edicts that members or other employees participate in secondary boycotts or in strikes in violation of 8(d). This compulsion also would coerce employees into participating in activities that would be unprotected —in essence placing them in double jeopardy.

Although the Supreme Court in *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967) exempted union punishment for crossing a lawful picket line from the operation of section 8(b)(1)(A) of the Act, it certainly did not create a presumption favoring the legality of strikes. The *Allis-Chalmers* exception to section 8(b)(1)(A) is applicable only where the union discipline or rule is associated with legitimate union activities, including *lawful* strikes. The lawfulness of the strike must be determined before

the *Allis-Chalmers* exception comes into operation. In other words, it is respectfully suggested that *Allis-Chalmers* requires an affirmative showing that the strike was lawful, in order to conclude that the union discipline or rule is not in violation of section 8(b)(1)(A).

A decision that 10(b) would bar this complaint would place employees in the untenable position of taking action against future union conduct before such conduct actually affects them. A kind of preventive war psychology would be implanted in the labor law, creating far greater problems than a rejection of the argument based on the 10(b) limitation. It would also amount to a holding contrary to common sense that because section 10(b) barred a complaint based in part on the illegality of the strike, the Union's post-strike conduct against employees is lawful.

CONCLUSION

For all of the reasons stated, it is respectfully prayed that the Board's order and decision that Petitioners violated Sections 8(b)(1)(A) and 8(b)(2) of the Act must be affirmed and enforced in all respects.

Respectfully submitted,

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Dated: November 19, 1974

United States Court of Appeals
for the Second Circuit

376—Affidavit of Service by Mail The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

Local 1104, Communications Workers of America, AFL-CIO and Local 1101 Communication Workers of Americas, AFL-CIO

Petitioners

against

National Labor Relations Board

Respondent

New York Telephone Company,

Intervenor

State of New York, County of New York, ss.:

Raymond J. Braddick, agent for George E. Ashley Esq., being duly sworn deposes and says that he is the attorney for the above named Intervenor, N.Y.Telephone Co. herein. That he is over 21 years of age, is not a party to the action and resides at Levittown, New York

That on the 22nd day of November, 1974 he served the within

Brief on Behalf of Intervenor, New York Telephone Company

upon the attorneys for the parties and at the addresses as specified below

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by depositing 3 true copies to each
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned,

that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 22nd.

day of November, 19 74

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1975